Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Brief of Defendants in Error

SUPREME COURT OF THE UNITED STATES.

October Term, 1890.

No. 151.

S. G. Bayne, J. M. Fuller and T. J. Melvin, Plaintiffs in Error and Defendants Below,

vs.

D. B. Wiggins, and Jane M. Wiggins, his wife, in right of the said Jane M. Wiggins, Defendants in Error and Plaintiffs Below.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

WOLF & GEORGE,
DAVENPORT & GRIFFITH,
Attorneys for Defendants in Error.

ERIE DISPATCH PRINT.

It follows that the court properly excluded evidence in support of that part of the plea which had been stricken out.

I respectfully ask that the judgment be affirmed.

M. L. CRAWFORD,

Of Counsel for Defendant in Error.

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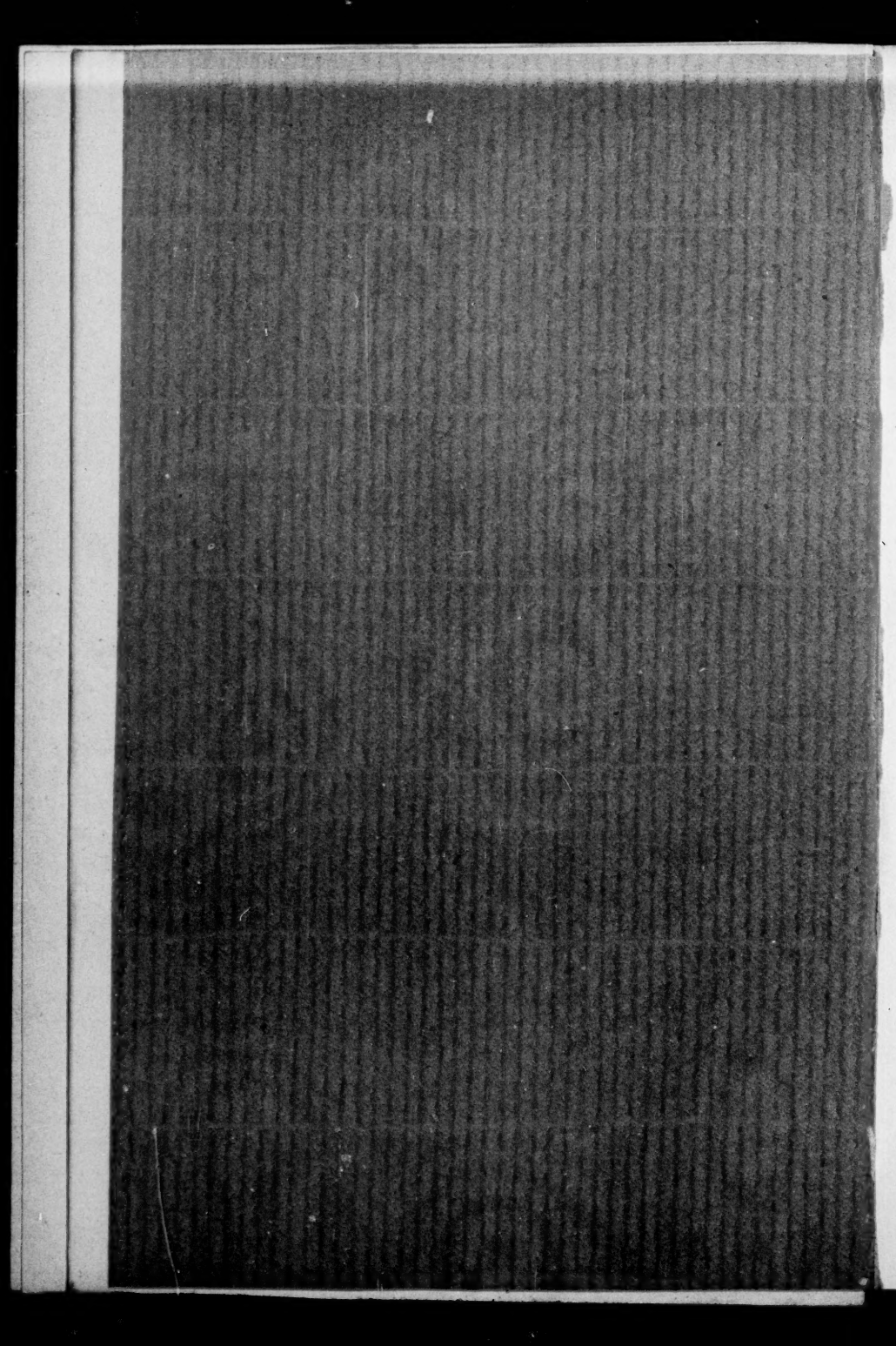

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No. 151, October Term, 1890.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE BY DEFENDANTS IN ERROR.

The defendants in error, residing at West Seneca, a suburb of the City of Buffalo, N. Y., brought suit for the recovery of the price of certain land claimed to have been bought from them by the plaintiffs in error.

In November, 1883, Jane M. Wiggins, the wife of D. B. Wiggins, one of the defendants in error, owned seventy acres of land near Bradford, Pennsylvania, which was regarded as oil territory, and on the 19th day of November, 1883, she received from T. N. Barnsdell a letter in which he stated, "I will take the land, as we talked, at $150 per acre, one-fourth cash and the balance in 4, 6 and 12 months, with interest. Get your

deed ready and I will come there, or you may come here; just as you choose." Transcript of Record, page 51.

On the 20th day of the same month D. B. Wiggins went to Bradford, where Mr. Barnsdell resided, for the purpose of making inquiry concerning his financial standing, and in case he became satisfied of his responsibility, to enter into a contract for the sale of the land to Mr. Barnsdell; and in the afternoon of said day called at the First National Bank, of Bradford, of which S. G. Bayne was the President and J. M. Fuller was the Vice-President, two of the above named plaintiffs in error, and there found Mr. Fuller, of whom he inquired as to the responsibility of Mr. Barnsdell, and Mr. Fuller replied that "he thought he was responsible," and then added "that they were operating largely in that vicinity, and they had thought about writing him (Wiggins) in reference to buying it." To which Mr. Wiggins replied as follows, to-wit:—"I said to him that he could have it at $140 per acre; that I had been offered $150 but that I would take $10 an acre less for cash." He said, "I will step out and see my pard," I suppose he meant his partner. He went out and was gone ten or fifteen minutes and came back and said they had made up their minds to offer me $10.000 for that lot." Record, page 35. On the following day Mr. Wiggins again called at the bank and there met Mr. Bayne and Mr. Fuller, and after some considerable conversation, it was finally agreed that the quantity of land in the tract was seventy acres, for which they would pay $10,000.00, $250 of which sum was paid to Mr. Wiggins and a receipt for same given by him. Thereupon Mr. Bayne wrote a paper specifying the terms of their agreement and directed the cashier of the bank to sign the same and then delivered it to Mr. Wiggins. The following is a copy of it:

"S. G. Bayne, President, J. M. Fuller, Vice President,
(T. Melvin), W. W. Bell, Cashier.
First National Bank of Bradford.

Bradford, Pa., November 21, 1883.

"Received $4,750 from Bayne, Fuller and Melvin, which is the cash payment on a lot of seventy acres of land sold to them by D. B. Wiggins for $10,000; the balance to be paid in notes and money as agreed on by both parties. I am to remit this money and the notes spoken of to said D. B. Wiggins on his forwarding a good deed of said land. The notes are to be $2,500 at 3 months, and $2,500 at 6 months, both with interest.

W. W. Bell, Cash."

Record, page 26.

Mr. Melvin was not present, nor did Mr. Wiggins have any conversation with him previous to the delivery of the deed for the land, in pursuance of said contract, but afterwards Mr. Melvin stated that they had purchased the land from Wiggins and had paid part of the purchase money, and spoke of the property as partly owned by him, and tried to make sale of it to other parties. Record, pages 53, 54 and 55. During the afternoon of the same day, Mr. Wiggins returned to Buffalo, N. Y., and on the next day, the 22d of November, he and his wife executed a deed for said land (see Record, pages 28 and 29), and at their request, E. W. Hayes, cashier of the Bank of Commerce, of Buffalo, N. Y., sent said deed to W. W. Bell, cashier, with a letter, of which the following is a copy.

"Buffalo, 11, 23, 1883.

W. W. Bell, Esq., Cashier, Bradford,

SIR—I enclose for collection and remittance, deed of J. M. and D. B. Wiggins, for which please remit us your draft on N. Y., * $4,750, and two notes given by

Bayne, Fuller and Melvin, $2,500 each, at 3 and 6 months, with interest, to order D. B. Wiggins.

Yours truly,

E. W. Hayes, C.

* we presume the remittance will be par."

Record, page 27.

In reply to said letter, W. W. Bell, cashier, wrote as follows, to-wit:

"S. G. Bayne, President. J. M. Fuller, Vice President.
W. W. Bell, Cashier.
First National Bank, of Bradford.
Bradford, Pa., 11, 24, 1883.

E. W. Hayes, Cashier.

DEAR SIR—Yours of the 23d inst. at hand. The search is taking longer than expected, but will probably be completed by Monday.

Yours truly,

W. W. Bell, Cash."

Record, page 27.

On the 27th day of November, 1883, Mr. Wiggins received from Mr. Bell a deed, dated November 26th, 1883, accompanied by a letter of which the following is a copy:

"S. B. Bayne, President. J. M. Fuller, Vice President.
W. W. Bell, Cashier.
First National Bank, of Bradford.
Bradford, Pa., 11, 27, 1883.

E. W. Hayes, Cashier.

DEAR SIR—I enclose a deed that Bayne, Fuller and Melvin's attorney wishes executed in place of the one sent by you, on receipt of which I will forward money, notes and old deed.

Yours truly,

W. W. Bell, Cash.

Record, page 27.

This is a Pennsylvania form and the other is a New York one."

This deed was duly signed and acknowledged by the defendants on the 27th day of November, 1883, and on the folllowing day returned to W. W. Bell. Said deed is on pages 30, 31 and 32 of the transcript of the Record.

On the 29th day of November, 1883, W. W. Bell returned both of said deeds to E. W. Hayes in a letter of which the following is a copy, to-wit:

"S. B. Bayne, President. J. M. Fuller, Vice President.
W. W. Bell, Cashier.
First National Bank, of Bradford,
Bradford, Pa., 11, 29, 1883.

E. W. Hayes, Esq., Cashier.

DEAR SIR—By request of Bayne, Fuller & Melvin, I return deed of D. B. Wiggins, to you. Their attorney has written Mr. Wiggins, giving the reasons for so doing.

Yours truly,
W. W. Bell, Cash."
Record, page 27.

And on the same day Mr. Wiggins received a letter from N. B. Smiley, attorney for Bayne, Fuller and Melvin, of which the following is a copy, to-wit:

Bradford, Pa., November 27, 1883.

D. B. Wiggins, Esq.

DEAR SIR—Bayne, Fuller and Melvin decline absolutely to purchase the 80 acres of land in LaFayette, this county, and ask you to at once refund the money paid and return the receipt given.

They have been put in posession of all the facts in detail, as to the means used by yourself, in collusion with others, to try and induce them to make the purchase. In addition to this, the title to the land is not good, and they decline to accept the deed offered, and have directed same to be returned. Prompt action on your part is demand-

ed. If you do not at once return the money and receipt, I have advised them to promptly take such action as the facts now in their possession certainly justify.

Respectfully yours,

N. B. Smiley."

The envelope in which said letter was sent, was distinctly marked Bradford, Nov. 29. Record, page 45.

The defendants in error aver that said letter was not written on the 27th day of November, but on the 29th, the same day said letter was posted, and that inasmuch as W. W. Bell, on the 24th of November, had written that the "search" would be completed by Monday, the 26th, and on Tuesday, the 27th he had again written to Mr. Hayes, enclosing another deed for the Wiggins' to sign, stating that "on receipt of which (the second deed), I will forward money, notes and old deed," Mr. Smiley must have been in error when he dated said letter November 27th, and that, in fact, it had been written after the receipt of the second deed.

For the purpose of more conveniently understanding the bearing which the dates of the letters have upon the facts of the case, we have made an extract from the calendar for the month of November, 1883.

S	M	T	W	T	F	S
18	19	20	21	22	23	24
25	26	27	28	29	30	31

On the 30th of November, after the receipt of the deeds and Smiley letter, Mr. Wiggins took the deed prepared by Mr. Smiley and went to Bradford, and, accompanied by his attorney, Mr. George, went to the bank, saw Mr. Bell, tendered the deed to him, and asked for

the money and notes, all of which he refused to give them; they then went to the office of Mr. Fuller, and there found both Mr. Fuller and Mr. Bayne. Mr. George asked them why they would not accept the deed, and Mr. Fuller replied that he believed there had been undue influence exercised to induce them to buy the land, but finally admitted that it was not on the part of Mr. Wiggins, he then stated that the title was imperfect, but did not state in what particular.

Record, pages 46 and 54.

Mr. Wiggins and Mr. George then left, and shortly thereafter this suit was brought.

On the trial no evidence was introduced, tending in slightest degree to prove the truth of the statements made by Mr. Smiley. It was claimed that the land in question had been sold for taxes, but it was proven beyond a doubt that no part of the Wiggins land sold to plaintiffs, being parts of Tracts Nos. 3432 and 3433, had been sold for taxes; and that the land which had been sold for taxes, was a part of Tract No. 2255.

Record, page 79.

During the negotiations, Mr. Wiggins had a map, correctly showing the location of the land referred to, and the same map was in evidence at the trial, and there was no allegation that it was incorrect.

After a careful consideration of the evidence, the jury found a verdict in favor of the plaintiff below, for their entire claim, and the defendants below thereupon made an application for a new trial. After full argument, the rule to show cause why a new trial should not be granted, was discharged.

ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

We do not deny that the contract entered into by the parties on the 21st day of November, 1883, was a parol agreement for the sale of land, and, standing by itself, could not have been enforced. But we contend that when Mr. Wiggins and wife executed and delivered to the plaintiffs in error a deed for the seventy acres, in which were fully set forth a description of the land, the names of the parties, and the consideration for the same, it became an executed parol agreement, and the vendees cannot escape from a compliance with the terms of said agreement. Before the delivery of the deed, they might have declined to comply with the stipulations of their contract, but having waited until the owners of the land had executed and delivered to them a deed for the land, for which they had agreed to pay $10,000, it was too late for them to make such a defense. To take the case out of the Statute of Frauds, it was only necessary for the vendors to execute and deliver to the vendees a deed for the land in question. The fact that Mrs. Wiggins owned the property in no wise affects the case. Mr. Wiggins agreed to sell the property and to make a good deed for it. This was done, Mrs. Wiggins having joined her husband in the execution of the deed. True the first deed was not properly acknowledged, but that happened from the ignorance of Pennsylvania law on the part of Mr. Wiggins, and not on account of the lack of a desire on the part of either Mr. or Mrs. Wiggins to carry out the terms of the agreement of November 21, 1883. The defendants below, however, did not return this defectively acknowledged deed to the Wiggins' for that reason, but held it, and asked for a second deed to

be executed to take the place of it, a "Pennsylvania form deed" was asked for, on the receipt of which they agreed to return the first. The erroneous acknowledgement was never complained of by the plaintiff in error. When their attorney, in his letter to D. B. Wiggins, enumerated the reasons for Bayne, Fuller and Melvin refusing to comply with their contract, he said nothing about the defective acknowledgement of the first deed, in fact, the error had been corrected and they had already received the "Pennsylvania form of deed," written by their own attorney. When Mr. Wiggins and his attorney, Mr. George, called on Mr. Fuller and Mr. Bayne, and demanded their reason for not paying the purchase money, and retaining the deed, they said nothing about the defective acknowledgement of the first deed, and only claimed that "undue influence" had been resorted to for the purpose of inducing them to buy the land, and that they thought the title was defective. Had there been any truth in the allegation that they had not received the deed written by their attorney, not only would Mr. Smiley have referred to it in his letter, but Mr. Fuller would not have forgotten to mention the fact when urged to give his reasons for refusing to comply with their contract. They were in search of excuses, and felt compelled to invent two frivolous reasons for their conduct, in proof of which not a particle of evidence was produced on the trial of the case. Whether or no the second deed had been sent to them by Mr. Wiggins, was a question of fact for the jury, and was fairly submitted to the jury.

Mrs. Wiggins was a married woman, and on that ground might have legally refused to be bound by the acts and doings of her agent, but this fact in no wise tends to release the plaintiffs in error from their obligations to fulfill their agreement. Want of mutuality will not afford a party a legal excuse for the violation of his agreement. One may undertake to contract with a

minor, or with a married woman, and the minor or married woman may conclude not to abide by the terms of the agreement, but their privilege to do so will not furnish a valid excuse for the other party to refuse to comply with his contract.

The fact that the receipt dated November 21, 1883, and the letters to Mr. E. W. Hayes, relating to the deeds, &c., were all signed by W. W. Bell, does not change or in any wise relieve the plaintiffs in error of their obligations, in any particular. Mr. Bayne wrote the receipt, and by his direction, in the presence of Mr. Fuller, W. W. Bell signed the receipt, and each letter he wrote was in pursuance of instructions from Bayne, Fuller and Melvin. Nor with any show of reason can it be pretended that the plaintiffs should not be bound by the letter, and statements of W.B. Smiley, their attorney. There was only one course for the trial judge to pursue, consistent with the law governing the evidence, and that was, to submit to the jury the several questions as to the agency of W. W. Bell, and the fact of Mr. Smiley's having been the attorney of the defendants below. This was done, and the jury passed on them, and by their verdict settled it as a fact that W. W. Bell acted for and on behalf of Bayne, Fuller and Melvin, and also that Mr. Smiley was their attorney.

But it was claimed that Mr. Melvin should not be held for the acts of Mr. Fuller and Mr. Bayne, without authority given to them by him. Unfortunately for this position, Mr. Melvin concurred in and ratified all that Mr. Bayne and Mr. Fuller did, by admitting that he was one of the purchasers, &c. This also was properly left to the jury by the Court, and decided against Mr. Melvin, by their verdict in favor of the plaintiffs below.

We hardly consider it necessary to cite numerous authorities in support of the legal principles so clearly expounded by the able judge in the Court below, and we

only cite a few, among many of the decisions of the Supreme Court of Pennsylvania, bearing upon the questions involved in the case.

The Statute of Frauds in Pennsylvania is as follows:

Statute of Frauds, of Pennsylvania.
1 Purden. 830.
Act of March 21, 1772.

"All leases, estates, interests in freehold or term of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only or by parol, and not put in writing and signed by the party, so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed to have any other or greater force and effect, any consideration for making any such parol leases or estates, or any form or law or usage to the contrary notwithstanding, except nevertheless, all leases not exceeding the term of three years from the making thereof."

In the case of Grove vs. Hodges, 55 Pa. St., 515, Judge Strong delivered a very able opinion, in which several of the questions raised in this case were discussed, and I have therefore quoted somewhat at length from it.

"Strong, J. But the plaintiff assails its validity on several grounds. The first is that it was void at law, as an act of Irwin, because it was not signed and sealed by him, or by his agent duly authorized, and being void as to him it was also void as an act of Garner, for want of mutuality. The instrument, upon its face, declares that Garner thereby sells to Irwin the right described, to-wit: the right to mine and take ore from the land for the consideration of twenty-five cents per ton agreed to be paid by Irwin, and it is signed and sealed by Garner. It is also signed and sealed "William Irwin (L. S.), by agent Miles McHugh." No sealed authority is shown, however, for McHugh's action, nor is Irwin shown to have adopted the seal which was affixed, or to have ratified the sealing by any sealed instrument, though there is

evidence that he accepted the contract as made. It must be taken therefore that the deed is not the deed of Irwin. None of the covenants which it contains are his covenants. Yet it does not necessarily follow from this that the contract between the parties to it was not mutual. If Irwin accepted the grant, he accepted it with its express conditions, and the contract became binding upon him to precisely the same extent as it would have been binding if he had personally signed and sealed the instrument. The mode of enforcing his obligations is different, but the duty is the same. It is assuredly plain law that if a party, who has not put his name to a written contract, accepts it when signed by the other party, it binds him the same as if he had signed it. Even mutual executory agreements are held binding upon both parties, though one may have signed and sealed, and the other signed but not sealed, though the agreements contain the words "witness the hands and seals of the parties," thus manifesting an intention that both should seal. The legal principal that contracts must be mutual, that they must bind both parties or neither, does not then mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one, when only assumpsit can be maintained against the other. Nor does the principal mean that when a contract is written, each party must sign it. The engagement of one may be in writing, and that of the other rest in parol, even when the contract is wholly executory. It is true that when a contract consists in mutual promises, both parties must be bound, or neither is; but in no case where the consideration is a covenant or a promise, is the form of the undertaking material. It is its substance. If then there were no other considerations, it would be impossible to hold that Garner was not bound by his grant to Irwin, because the contract was not mutual. McHugh was authorized to procure leases for Irwin, though not authorized to seal them. He procured this from Garner, and Irwin accepted it, had it put upon record by his direction or with his sanction, and thus he became liable to perform all that the instrument stipulated he should. Under these circumstances it cannot be said there was no mutuality in the contract.

But there is another view of the case which relieves it from all difficulty on this point. Want of mutuality

is no defense to either party, except in cases of executory contracts. It has no applicability to an executed bargain."

Contracts for the sale of land must be in writing; the land sold must in some way be described, and the price to be paid must be stated. By whom the contract must be signed and the particularity with which the land must be described and the price stated, are questions which have frequently arisen in cases adjudicated by the Supreme Court of Pennsylvania.

In our case a portion of the purchase money had been paid; a paper containing the terms of sale was written by one of the parties and delivered to the plaintiffs below, and thereupon they had prepared and delivered to the defendants below a deed for the land sold. This was certainly all that was required to take the case out of the Statute of Frauds.

In the case of Tripp vs. Bishop, 56 Penn'a St. 424, Judge Strong, in delivering the opinion of the Court, said:

Neither the English Statute nor ours requires that the written agreement or memorandum of the sale should be signed by both parties—a receipt for the purchase money, if it describe the lands, has been held sufficient. 9 Vesey 234, 12 Id. 466. And even a note or letter has more than once been held to be a sufficient agreement, to take the case out of the Statute. Sugden on Vend. 45.

This is even more certain under our Statutes than under 29 Chas. 2. The words of the latter are, "unless the agreement, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith." Our act declares that all leases, estates, interests of freehold, &c., shall have the force and effect of lease or estates at will only, unless put in writing and signed by the parties making or creating the same, that is the parties making the leases or creating the estates. It is only the lessor or grantor who is required to sign the agreement. His contract must be in writing and signed by

himself, but the Statute required no written evidence of the engagement of the lessee or grantee. The Statute of Frauds was passed for the protection of the land owners. It was intended to guard them against perjuries in the proof of parol contracts. To secure this protection, it prescribes a rule of evidence, by which alone their estates can be diverted. This is intimated in Lowry vs. Mehaffy, Io. Watts, 387.

There it was ruled that an agreement for the sale of land reduced to writing, and signed by the vendor alone, and delivered to the vendee, was all that the Statute requires. It is true that in that case it appeared the contract had been partially executed; but not sufficiently to give effect to a parol sale.

After all, it was the signature of the agreement by the vendor alone which made the sale effective. The same thing was ruled in McFarson's Appeal, 1 Jones, 503. The case of Wilson vs. Clark, 1 W. & S., 544, is not in conflict with these decisions. There the contract rested entirely in parol. The vendor had signed no agreement. He could not therefore have been compelled to make a conveyance, and for this reason he was not allowed to enforce the contract specifically against the other party. But in the present case the vendor has made a deed for the land and signed it; he has sent it to an agent to be delivered. The vendees examined it, were satisfied with it, accepted it, and paid the hand money to the agent. Contract was made and closed at that time. The parties then agreed that the deed should remain in the agent's hands until the time of credit expired for the remaining purchase money or until it should be paid. Surely it cannot be said the plaintiff was not bound by the contract then made, he could not take back his deed with the $2,500.00 paid him in hand. Had the defendant tendered the remaining purchase money, a Court of Equity would doubtless have compelled a consummation of the contract in the delivery of the deed. The contract was therefore mutually obligatory, and evidenced by all that the Statute of Frauds required. Nothing remained in parol but the agreement to pay the purchase money, and the Statute does not require that to be in writing. On the facts then as submitted to the jury and found by them, we are of opinion the Statute does not effect the rights of the parties as to each other. The evi-

dence required by it is supplied, and there is nothing in the case which renders inapplicable, the general rule that in actions for the breach of a promise to pay a sum of money, together with interest, from the time when payment should have been made.

Of that it suffices to say that the deed was evidence of a written agreement, such as the plaintiff asserts, though it may not prove the whole contract.

NOTE.—In this case the paper offered in evidence was as follows :—I will take $13,000.00 for my share of the Dotterer farm ; $2,500.00 down, balance in six months, with interest, the money so secured that there will be no doubt of getting the money when due.

Dec. 2, 1864. W. E. Bishop."

"Hodge will make deed and send to me. Received first payment and deposit. I will depend on you and Hodge to make everything sure in this sale. W. E. B.

Witness further said, "defendants were present when the money was drawn, saw it when it came back signed, and when the money was paid ; the deed was left with him by agreement of defendants and himself, the money was to be paid at Harrisburg, where he was then going. The proper stamps were present when the deed was drawn ; they were put into the deed, but not cancelled, he afterwards took the stamps out and used them."

We also cite the case of McFarson's Appeal, 1 Penn'a St. 510.

In the opinion filed by Justice Bell in this case, he refers to the case of Huddlestone vs. Briscoe, 11 Casey, 591, with approval and comments as follows :

"No express form of words is necessary to its validity. Any memorandum in writing, indicative of the intent of the parties, and so precise as to enable the inquirer to ascertain the terms of the contract, the land to be conveyed, and the price to be paid for it, is sufficient. Thus a correspondence by letters, which reasonably import a conclusion, has been sustained as an agreement. Strathford vs. Bosworth, 2 Ves., 366."

In the same opinion, Judge Bell says : "The general rule, with the explanations I have stated, is recognized by our own case of Holt vs. Selden, 5 W. 528, which, with the English authorities, also ascertain that their